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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

JONATHAN CHANG & WEILIN CHANG

Defendants.

Case No. 16-cr-00047 EJD

**DEFENDANTS JONATHAN CHANG  
AND WEILIN CHANG'S OPPOSITION  
TO UNITED STATES' MOTION *IN*  
*LIMINE* RE: STEVEN BOYLES**

Pretrial Conference: July 31, 2019

Time: 1:30 p.m.

Dept: Courtroom 1, 5th Floor

Judge: Hon. Edward J. Davila

Date Filed: July 3, 2019

Trial Date: August 13, 2019

Defendants Jonathan and Weilin Chang, through their counsel, respectfully submit the following opposition to the United States' Motion *in Limine* Regarding Steven Boyles (Dkt. No. 115).

## I. FACTUAL BACKGROUND

On July 3, 2019, Defendants designated Steven Boyles as their testifying expert. *See* Dkt. 103. That submission summarized the expected testimony of Mr. Boyles. On the same day, Defendants provided the government with Mr. Boyles' expert report and accompanying, detailed exhibits.

On the first page of his report, Mr. Boyles lists the documents and information he considered and relied upon in formulating his report as follows:

- Quicken Files for:
  - HOC Associates, Inc. ("INC")
  - HOC Associates, LLC ("LLC")
- Various Bank Statements
- INC Form 990s
- Loan Agreements and Amendments
- Correspondence and Other Communications
- Other General Discovery Provided
- Conversations with Jonathan Chang

*See* Dkt. 115-1 (Redacted Boyles' Report) and Attached Exh. A (Boyles' Report).<sup>1</sup> Mr. Boyles' report then goes on to explain exactly how he conducted his analysis. *Id.* Specifically, on Page 2 of his report, Mr. Boyles precisely articulates what conversations with Jonathan Chang he *relied upon* in preparing his report.

I further understand through conversations with Jonathan Chang that to record most of the information reflected in the Quicken files, he would electronically download the transactions directly from the various banks and credit card companies directly into the Quicken data file and run a reconciliation of such to the banks electronically.<sup>1</sup> I was able to confirm the reasonableness of Mr. Chang's representation by reviewing the Quicken transaction reports and noting that the majority of transactions were marked with an "R" in the "Clr" column.<sup>2</sup>

*Id.* at 2.

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<sup>1</sup> The report is being publicly filed in redacted form due to sensitive financial information.

Mr. Boyles included this information from Jonathan Chang in his report because he relied on the Quicken software and reports to generate his expert report. To generate his own report, Mr. Boyles needed to understand how the user – here, Mr. Chang – accessed the Quicken program. Mr. Boyles’ was then able to verify what Mr. Chang told him by noting the “R” and “Clr” notations made by the Quicken software. Mr. Boyles then spelled out his findings. This is the only information from Jonathan Chang that Mr. Boyles relied upon to complete his expert report.

As is evident from the forensic analysis described in his report, Mr. Boyles – unlike Agent Kikugawa – did not rely upon interviews and emails from HOC4 members to reach his conclusions. His report is precisely what a forensic accounting report should be – one based on math, science, and accounting principles.

Defense counsel has repeatedly told government counsel that the report is complete and that Mr. Bolyes – who was designated as an expert on July 3, the date his report was completed and disclosed – has nothing additional to add. Yet the government seems insistent on disbelieving the representations of both counsel and Mr. Boyles.

## II. ARGUMENT

### A. Required Production Under F.R.E. 702 and Rule 16(b)(1)

Defense counsel complied with Federal Rules of Evidence 702 and Federal Rule of Criminal Procedure 16(b)(1) by providing precisely the information required by the Rules. The government’s motion does not point to a single deficiency in the disclosure or an allegation of a failure to comply with Rule 16(b)(1).

Defense counsel has not attempted to hide Mr. Boyles’ opinions or conclusions, has not skirted the requirements of the Rules, and has not filed a deficient expert notification. It is unclear what the Government complains about other than a general failure to accept the report and conclusions as a truthful representation of what was relied upon by Mr. Boyles.

### B. No Further Disclosures are Warranted

The government claims that “Rule 16 requires the defense to provide additional information regarding the conversations because they form the basis of Boyles’ opinion, as Boyles

1 asserts.” Gov. Mot. at 3. The government is incorrect. Rule 16(b)(1)(A) requires a defendant to  
2 disclose:

3 “...books, papers, documents, data, photographs, tangible objects, buildings or places, or  
4 copies or portions of any of those items if:

- 5 (i) The item is within the defendant’s possession, custody or control; and  
6 (ii) The defendant intends to use the item in defendant’s case-in-chief at trial.”

7 Fed.R.Crim.Pro. 16(b)(1)(A). Clearly, nothing within this rule falls into what the government is  
8 seeking, as defendants do not intend to use any of items listed in Rule 16(b)(1)(a) in the testimony  
9 of Steven Boyles other than his report and exhibits – *which have been disclosed*.

10 Turning to Rule 16(b)(1)(C): this section requires a “written summary” of testimony by an  
11 expert. Defendants have also complied with this requirement.

12 Finally, Rule 16(b)(2) clearly sets forth information *not* subject to disclosure:

13 Except for scientific<sup>2</sup> or medical reports, Rule 16(b)(1) does not authorize discovery or  
14 inspection of:

15 (A) reports, memoranda, or other documents made by the defendant, or the defendant's  
16 attorney or agent, during the case's investigation or defense; or

17 (B) a statement made to the defendant, or the defendant's attorney or agent, by:

- 18 (i) the defendant;  
19 (ii) a government or defense witness; or  
20 (iii) a prospective government or defense witness.

21 Fed.R.Crim.Pro. 16(b)(1)(C). The government adopts a novel reading of Rule 16 in claiming that  
22 “additional” information is required from Steven Boyles. To the contrary, nothing additional is  
23 required, as spelled out by Rule 16.

24 Moreover, there is no “additional information” to be provided. Mr. Boyles was clear that  
25 he verified how Quicken was handled by Mr. Chang, and Mr. Boyles included that information in  
26 his report. The report speaks for itself. *See* Exh. A.

### 27 **C. The Government Cannot Receive Attorney-Client or Work-Product Privileged Communications**

28 The government claims that they are unable to “test” the opinions in Mr. Boyles’ report.

<sup>2</sup> Mr. Boyles’ report may be considered a “scientific report” which of course has been provided.

1 To the contrary, defense counsel has provided the government with the very same Quicken files  
2 that Mr. Boyles relied upon in preparing his report. The government is able to “test” Mr. Chang’s  
3 representations about the reconciled bank statements with Quicken by looking at the same data  
4 reviewed by Mr. Boyles. There is no “hiding the ball” here – the data, attachments, and Quicken  
5 file are clear.

6 Information or communications furnished to an accountant hired to assist an attorney or  
7 serve the interests of the client and attorney are protected by the attorney-client privilege. *United*  
8 *States v. Schwimmer*, 892 F.2d. 237 (2nd Cir. 1989). Here, there has been no general waiver of the  
9 entire attorney-client privilege; the waiver is limited to what is noted in Mr. Boyles’ report  
10 regarding the verification of how Quicken was used.

11 The government cites to *United States v. Alvarez*, 519 F.2d 1036 (3<sup>rd</sup> Cir. 1975) for the  
12 proposition that it is entitled to privileged communications. *Alvarez* is hardly comparable, as it had  
13 to do with a mental examination by a psychiatrist. The statements the defendant made in *Alvarez*  
14 to the psychiatrist were the *primary basis* of the expert’s assessment of defendant’s competency.  
15 There, the expert’s opinion was dependent upon the client’s statements so as to determine whether  
16 the defendant was competent. The *Alvarez* court ultimately concluded, though, that admission of  
17 the expert was error requiring a new trial. *Id.* at 1047. Here, Mr. Boyles is not reporting on Mr.  
18 Chang’s mental state; Mr. Boyles is conducting a financial analysis using financial records.

19 The quote provided by the government from *Smith v. McCormick*, 914, F.2d 1153, 1160  
20 (9<sup>th</sup> Cir. 1990) also does not bolster the government’s position: “We agree with the Third Circuit  
21 that a defendant’s communication with her psychiatrist is protected up to the point of testimonial  
22 use of that communication.” In *McCormick*, the expert opinion was exclusively concerned with  
23 the defendant’s psychological state and thus, the defendant’s statements to the psychiatrist were  
24 relevant. Indeed, in cases regarding a defendant’s competency or mental state, the communications  
25 from defendant to psychiatrist are the heart of the expert’s assessment and therefore, may be  
26 disclosed. A similar principle applies to physicians who testify about a patient’s ailments – the  
27 privilege would be waived because the ailments would be the very subject of the physician’s  
28

1 testimony. *See City & County of San Francisco v. Superior Court in and For the City and County*  
2 *of San Francisco*, 37 Cal.2d. 277 (1951).

3 Here, not only has Mr. Boyles' articulated precisely the communication he considered, but  
4 he is not opining on defendant's mental state. He is merely reporting that he verified with Mr.  
5 Chang how the Quicken file was used. The government is attempting to bootstrap Mr. Boyles'  
6 statement that he "communicated" with Mr. Chang regarding the Quicken software into a waiver  
7 of all attorney-client communications. The Court may read for itself the contents of Mr. Boyles'  
8 report to confirm that it is not dependent on any other communications.<sup>3</sup>

9 Equally troubling is the government's insistence on the disclosure of the entirety of Mr.  
10 Chang's communications with counsel and Mr. Boyles because it implicates Mr. Chang's Fifth  
11 Amendment right against self-incrimination, Sixth Amendment right to the effective assistance of  
12 counsel and Fifth Amendment right to Due Process.<sup>4</sup> In the line of cases cited by the government,  
13 the thing at issue – the defendant's mental state – is revealed through communications with the  
14 patient-defendant. When the defendant uses their mental state as a defense, the defendant may  
15 waive their right against self-incrimination as to those related statements. However, in this case,  
16 Mr. Chang is not claiming that a mental state defense applies; his statement to Mr. Boyles merely  
17 clarified the use of *software*. Unlike the psychiatrist-patient cases cited by the government, Mr.  
18 Boyles' report is based on an examination of accounting records, not Mr. Chang's mental or  
19 psychological state.

20 Further, communications in any form between a "party's attorney" and an expert who is  
21 required to provide an expert witness report are protected as qualified attorney work-product,  
22 subject to certain and specified exceptions. *Republic of Ecuador v. Mackay* 742 F.3d 860, 869-871  
23

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24 <sup>3</sup> The full, un-redacted report (Exhibit A) is being submitted to the Court under seal, as it contains sensitive financial  
25 information.

26 <sup>4</sup> Defendant should not have to sacrifice one constitutional right (6th Amendment right to counsel) for another  
27 constitutional right (5th Amendment). *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977) ("the touchstone of the  
28 Fifth Amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable  
of forcing the self-incrimination which the Amendment forbids."). Defendant's Sixth Amendment right to counsel is  
hampered if communications aren't privileged. *Id.*

1 & fn. 4 (9<sup>th</sup> Cir. 2014) (analyzing expert disclosures under Civil Rule 26(a)(2)(B)). The  
 2 government’s suggestion that it is entitled to all communications between counsel and Mr. Boyles  
 3 or Mr. Boyles, counsel and Mr. Chang, even though his testimony is not dependent on those  
 4 communications, is an untenable position not supported by any precedent that counsel is aware of.

5 Importantly, in the criminal context, the protections of the Fifth and Sixth Amendments are  
 6 even greater:

7 “Although the work-product doctrine most frequently is asserted as a bar to discovery in  
 8 civil litigation, its role in assuming the proper functioning of the criminal justice system is  
 9 even more vital. The interest of society and the accused in obtaining a fair and accurate  
 resolution of the question of guilt or innocence demand that adequate safeguards assure the  
 thorough preparation and presentation of each side of the case.”

10 *United States v. Nobles*, 422 U.S. 225, 238 (1975). In *Nobles*, the defendant offered the testimony  
 11 of his investigator to contrast the investigator’s recollection of the contested statements with those  
 12 of the prosecution’s witnesses. *Id.* The court found that by putting the investigator’s report (which  
 13 previously hadn’t been disclosed) at issue, the defendant waived the work-product privilege as to  
 14 that report. *Id.* Defendants agree, and that is why they disclosed Mr. Boyles’ **report** (and, though  
 15 unrelated to Mr. Boyles, six witness interviews written by Defendants’ investigator). Though  
 16 Defendants maintain that *Jencks* does not apply to experts – because the expert report *is* the  
 17 “statement” of the expert – Defendants have already represented to the government that they have  
 18 no additional “statements” of Mr. Boyles to provide.<sup>5</sup>

19 In persisting on this privilege issue, the government appears to be grasping at straws in an  
 20 effort to suppress Mr. Boyles’ exonerating report. Thus, one can only presume that the  
 21 government hopes to gain some tactical advantage by seeking attorney-client and work-product  
 22 privileged communications that have no bearing on Mr. Boyles’ report or his conclusions. It  
 23 merits repeating that Mr. Boyles has already disclosed the communications that he relied upon on  
 24 Page 2 of his report. Reading the report itself confirms that the analysis is not dependent on any  
 25 communications other than that.

26  
 27 <sup>5</sup> *United States v. Jones*, 72 F.3d 920 (D.C. 1995)(“The court permissibly concluded that the notes discussed in the  
 28 testimony of expert witness Gladys Segal are not *Jencks* Act documents.”)

**III. CONCLUSION**

For the reasons stated, Defendants Jonathan and Weilin Chang respectfully request that the court deny the Government's Motion *in Limine* Re Steven Boyles and not permit an unjustified and unreasonable waiver of Defendants' Fifth and Sixth Amendment rights.

Dated: July 18, 2019

Respectfully submitted,

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/s/

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